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## The Case Against a Judicially Created, Common-Law Self-Audit or Self-Evaluation Privilege Applicable to Environmental Cases

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# ARTICLES

## **THE CASE AGAINST A JUDICIALLY CREATED, COMMON-LAW SELF-AUDIT OR SELF- EVALUATION PRIVILEGE APPLICABLE TO ENVIRONMENTAL CASES**

*James Cox*

### I. INTRODUCTION

In the realm of environmental litigation and enforcement few developments have prompted as much controversy as the judicially created, common-law “self-audit,” “self-evaluation” or “self-critical analysis” privilege.<sup>1</sup> The policies behind the privilege have evolved into statutory and regulatory initiatives in a number of states, as well as federal policy initiatives within the Environmental Protection Agency (“EPA”) and the Department of Justice (“DOJ”). In their various forms, these policies grant benefits to owners and operators of contaminated properties who take the risk and expense of voluntarily performing environmental audits of their properties. These benefits might include the exclusion of the audit results from the evidentiary record, a privilege against discovery of surveys and test results, an immunity from prosecution under one or more theories of liability, and/or a reduction in fines, sentences or damage awards.

In contrast to its legislative and administrative counterparts, the judicially created or common-law self-audit privilege relies on a broad reading of existing evidentiary and discovery-based doctrines to justify conferring a benefit on the sponsor of an environmental self-audit who has become enmeshed in litigation. The policy justifications most often proffered in support of the privilege are corollaries to the cynical adage: “no good deed goes unpunished.”

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1. These terms will be used interchangeably throughout this paper, as the courts and commentators have done, in order to avoid any preference for a single term.

This paper will argue that the judiciary should not attempt to develop a self-audit or self-evaluation privilege based on principles embodied in existing rules of evidence and procedure. Rather, it should allow policy-makers to perform their craft and fashion policies that address the particular needs of their jurisdictions and interests of the parties concerned, relying on penalty-based incentives rather than incentives that promote secrecy and distrust of regulatory oversight mechanisms. The section that follows will examine the history and development of the common-law self-audit or self-evaluation privilege.

## II. HISTORY AND DEVELOPMENT OF THE JUDICIALLY CREATED, COMMON-LAW SELF-AUDIT OR SELF-EVALUATION PRIVILEGE

The environmental self-audit privilege traces its roots to a similar privilege that originally arose in the field of medical-malpractice, specifically in the 1970 case *Bredice v. Doctors Hosp., Inc.*<sup>2</sup> In *Bredice*, plaintiff sought production of the minutes of peer-review committee meetings that were conducted at defendant's hospital. According to the court:

The purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques. . . . The value of these discussions and reviews in the education of the doctors who participate, and the medical students who sit in, is undeniable. This value would be destroyed if the meetings and the names of those participating were to be opened to the discovery process.<sup>3</sup>

In finding that the requested documents were not subject to discovery, the court relied solely on public policy grounds,<sup>4</sup> stressing

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2. 50 F.R.D. 249 (D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

3. *Id.* at 250.

4. *Id.* According to the court, "[t]he public interest may be a reason for not permitting inquiry into particular matters by discovery." *Id.* at 250-51 (quoting 4 WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 26.22(2), at 1287 (2d ed. 1969)). "These committee meetings, being retrospective with the purpose of self-

the overriding need for confidentiality to ensure the proper functioning of the hospital peer-review system. The court found that:

[C]onfidentiality is essential to the effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. . . . To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit.<sup>5</sup>

Since 1970, when *Bredice* was decided, the self-critical analysis privilege has been applied by various federal district courts in a number of contexts, including the protection of equal employment compliance records,<sup>6</sup> accounting records,<sup>7</sup> securities audits,<sup>8</sup> academic peer reviews,<sup>9</sup> railroad accident investigations,<sup>10</sup> product safety assessments,<sup>11</sup> and prior accident investigations.<sup>12</sup> However, as a court noted in 1997, "there is division among the federal courts on the issue of the self-critical analysis privilege. 'The Supreme Court and circuit courts have neither definitively denied the exis-

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improvement, are entitled to a qualified privilege on the basis of this overwhelming public interest." *Id.* at 250-51.

5. *Id.* at 250.

6. *See Reichhold Chems., Inc. v. Textron, Inc.*, 157 F.R.D. 522, 525 (N.D. Fla. 1994) (citing *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971)).

7. *Id.* (citing *N.Y. Stock Exch. v. Sloan*, 22 Fed. R. Serv. 2d (Callaghan) 500 (S.D.N.Y. 1980)).

8. *Id.* (citing *In re Crazy Eddie Sec. Litig.*, 792 F. Supp. 197 (E.D.N.Y. 1992)).

9. *Id.* (citing *Keyes v. Lenoir Rhyne Coll.*, 552 F.2d 579 (4th Cir. 1977), *cert. denied*, 434 U.S. 904 (1977)).

10. *Id.* (citing *Granger v. Nat'l R.R. Corp.*, 116 F.R.D. 507 (E.D. Pa. 1987)).

11. *Id.* (citing *Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518 (E.D. Tenn. 1977)).

12. *Id.* (citing *Bradley v. Melroe Co.*, 141 F.R.D. 1 (D.C. 1991)).

tence of such a privilege, nor accepted it and defined its scope.”<sup>13</sup> That division still exists.

The elements of the judicially created self-evaluation privilege were set forth in the case of *Dowling v. American Hawaii Cruises, Inc.*<sup>14</sup> According to the court, precedent required that, in order to qualify for the privilege, the information must (1) result from a critical self-analysis undertaken by the party seeking protection; (2) be of a type, the free flow of which the public has a strong interest in preserving; (3) be of a variety whose flow would be curtailed if discovery were allowed; and (4) have been prepared with the expectation that it would be kept confidential, and must have been actually kept confidential.<sup>15</sup>

The court in *Dowling* nevertheless held that the minutes of safety meetings, conducted on the cruise ship on which the plaintiff had been injured, were not subject to privilege, in part because “[e]ven if such privilege exists, the justifications for it do not support its application to voluntary routine safety reviews. . . . [S]uch reviews will rarely, if ever, be curtailed simply because they may be subject to discovery.”<sup>16</sup>

The Supreme Court has addressed the application of the self-audit privilege on only one occasion. In *University of Pennsylvania v. Equal Employment Opportunity Commission*,<sup>17</sup> a university professor claimed that she had been denied tenure in violation of Title VII

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13. Carr v. El Dorado Chem. Co., No. 96-1081, 1997 U.S. Dist. LEXIS 5752, at \*20-\*21 (W.D. Ark. Apr. 14, 1997) (quoting *Dowling v. Am. Haw. Cruises, Inc.*, 971 F.2d 423, 425 n.1 (9th Cir. 1992)). Cf. *EEOC v. Gen. Tel. Co. N.W.*, 885 F.2d 575 (9th Cir. 1985) (reversing grant of privilege as to equal employment opportunity efforts because privilege, if any, was waived by party's use of evidence at trial); *Coates v. Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir. 1985) (affirming lower court holding that discipline records were admissible).

14. 971 F.2d 423 (9th Cir. 1992).

15. *Id.* at 425-26 (citing Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1086 (1983); James J. Flanagan, *Rejecting a General Privilege for Self-Critical Analyses*, 51 GEO. WASH. L. REV. 551, 574-76 (1983) (citing 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2285, at 527 (J. McNaughton rev. ed., 1961))).

16. *Dowling v. Am. Haw. Cruises, Inc.*, 971 F.2d at 426.

17. 493 U.S. 182 (1990).

of the Civil Rights Act of 1964. As part of its investigation, the Equal Employment Opportunity Commission (EEOC) served a subpoena upon the university, seeking peer review information related to the professor's employment. When the university refused to produce the material, the EEOC filed an action to enforce the subpoena in the United States District Court for the District of Columbia.<sup>18</sup> When the court ordered production of the documents, the university appealed, arguing that "policy considerations and First Amendment principles of academic freedom required the recognition of a qualified privilege or the adoption of a balancing approach that would require the Commission to demonstrate some particularized need, beyond a showing of relevance, to obtain peer review materials."<sup>19</sup> The court of appeals affirmed the district court's decision, rejecting the university's claim that policy considerations and the First Amendment provide a qualified privilege against disclosure of the materials.<sup>20</sup>

In ruling on the validity of the university's claim of privilege, the Supreme Court observed that "[p]etitioner's common-law privilege claim is grounded in Federal Rule of Evidence 501."<sup>21</sup> That rule provides that "the privilege of a witness . . . shall be governed by the principles of the common-law as they may be interpreted by the courts of the United States in the light of reason and experience."<sup>22</sup> Reviewing its precedent, the Court noted that:

We do not create and apply an evidentiary privilege unless it "promotes sufficiently important interests to outweigh the need for probative evidence . . . ." Inasmuch as "testimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence, any such privilege must "be strictly construed."<sup>23</sup>

Although the Court recognized that "Rule 501 manifests a congressional desire 'not to freeze the law of privilege' but rather to

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18. *Id.* at 185-87.

19. *Id.* at 188.

20. *Id.*

21. *Id.*

22. *Id.* (omission in original) (quoting FED. R. EVID. 501).

23. *Id.* at 189 (quoting *Trammel v. United States*, 445 U.S. 40, 50-51 (1980) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950))).

provide the courts with flexibility to develop rules of privilege on a case-by-case basis,”<sup>24</sup> the Court nevertheless determined that it was “disinclined to exercise this authority expansively.”<sup>25</sup> The Court was “especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself. The balancing of conflicting interests of this type is particularly a legislative function.”<sup>26</sup> The Court concluded that “[w]ith all this in mind, we cannot accept the University’s invitation to create a new privilege against the disclosure of peer review materials. . . . Congress, in extending Title VII to educational institutional and in providing for broad EEOC subpoena powers, did not see fit to create a privilege for peer review documents.”<sup>27</sup>

It is important to note that in “punting” to Congress the decision whether to create a common-law privilege for self-evaluative peer-review documents, the Court was not oblivious to the policy concerns favoring and opposing such a privilege. Rather, according to the Court:

[We need not] question, at this point, petitioner’s assertion that confidentiality is important to the proper functioning of the peer review process under which many academic institutions operate. The costs that ensue from disclosure, however, constitute only one side of the balance. As Congress has recognized, the costs associated with racial and sexual discrimination in institutions of higher learning are very substantial. . . . Often, . . . disclosure of peer review materials will be necessary in order for the Commission to determine whether illegal discrimination has taken place.<sup>28</sup>

However, rather than balancing the competing interests it enunciated, and considering the propriety of granting the privilege, the Court determined that Congress, “has made the choice”<sup>29</sup> by crafting the organic statute without providing a privilege against the disclo-

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24. *Id.* at 189.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 193.

29. *Id.* at 194.

sure of peer-review documents. "If [Congress] dislikes the result, it of course may revise the statute."<sup>30</sup>

In addition to its finding that the creation of a self-evaluative privilege was the job of the legislature,<sup>31</sup> the Court alluded to the fact that creation of a common-law privilege for peer-review materials in the academic arena would open the floodgates to similar claims of privilege in other contexts, and would make the job of line-drawing difficult. According to the Court:

Acceptance of petitioner's claim would also lead to a wave of similar privilege claims by other employers who play significant roles in furthering speech and learning in society. What of writers, publishers, musicians, lawyers? It surely is not unreasonable to believe, for example, that confidential peer reviews play an important part in partnership determinations at some law firms. We perceive no limiting principle in petitioner's argument. Accordingly, we stand behind the breakwater Congress has established: unless specifically provided otherwise in the statute, the EEOC may obtain "relevant" evidence.<sup>32</sup>

Finally, it is important to note that in ruling on the university's privilege claim, the Court made no reference to *Bredice* or its progeny. Instead, according to the Court, "we see nothing in our precedents that supports petitioner's claim. . . . A privilege for peer review materials has no similar historical or statutory basis."<sup>33</sup>

In spite of this seemingly powerful language by the Court militating against the creation of a common-law self-evaluative privilege, courts have nevertheless continued to uphold the privilege, in one case even citing *University of Pennsylvania* as authority for the proposition that "[f]ederal courts are empowered to adopt new common-law privileges pursuant to Rule 501 . . . on a case by case basis."<sup>34</sup>

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30. *Id.*

31. At least in those contexts in which there is an organic statute providing a framework for resolution of competing interests.

32. *Id.*

33. *Id.* at 194-95.

34. *Reichhold Chems., Inc. v. Textron, Inc.*, 157 F.R.D. 522, 526 (N.D. Fla. 1994) (citing *Univ. of Pa. v. Equal Employment Opportunity Comm'n*, 493 U.S. 182, 189 (1990)). *See also Joiner v. Hercules, Inc.*, 169 F.R.D. 695 (S.D. Ga. 1996) (holding that the self-



The self-critical analysis privilege was first applied to an environmental case in *Reichhold Chemicals, Inc. v. Textron, Inc.*<sup>35</sup> In that case, plaintiff Reichhold had entered into a consent order with the Florida Department of Environmental Regulation, under which the company had agreed to investigate and remediate groundwater contamination at an industrial site it owned. The company then brought action against a number of former owners pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") to recover response costs. During the course of the litigation, Reichhold objected to the production of certain documents on the ground that the self-critical analysis privilege protected them from discovery.<sup>36</sup>

In evaluating Reichhold's claim, the court reviewed a few of the policy implications supporting the privilege:

The self-critical analysis privilege has been recognized as a qualified privilege, which protects from discovery certain critical self-appraisals. . . . The privilege protects an organization or individual from the Hobson's choice of aggressively investigating accidents or possible regulatory violations, ascertaining the causes and results, and correcting any violations or dangerous conditions, but thereby creating a self-incriminating record that may be evidence of liability, or deliberately avoiding making a record on the subject (and possibly leaving the public exposed to danger) in order to lessen the risk of civil liability.<sup>37</sup>

The court then proceeded to recite a brief history of the development of the privilege, beginning with its first recognition in *Bredice*.<sup>38</sup> The court conceded that:

[T]he self-critical analysis privilege has not been universally acknowledged. The privilege has been denied by

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critical analysis privilege "promote[s] sufficiently important interests to outweigh the need for probative evidence." (citation omitted) (alteration in original) (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980))).

35. *Reichhold*, 157 F.R.D. 522 (N.D. Fla. 1994).

36. *Id.* at 524.

37. *Id.* (citation and footnote omitted).

38. *Id.* at 525 (citing *Bredice v. Doctors Hosp.*, 50 F.R.D. 249, 249 (D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973)).

some district courts, even in the medical peer review context in which it has achieved widespread acceptance. Some courts have refused to recognize the privilege in an affirmative action context. A few courts and commentators have questioned whether the lack of a privilege really curtails the free flow of critical information within an organization.<sup>39</sup>

Applying the doctrine of the self-critical analysis privilege to the facts before it, the court in *Reichhold* observed that:

[I]t is self-evident that pollution poses a serious public health risk, and that there is a strong public interest in promoting the voluntary identification and remediation of industrial pollution. The public interest in allowing individuals and corporations to candidly assess their compliance with environmental regulations “promotes sufficiently important interests to outweigh” the interest of opposing private litigants in discovering this potentially highly prejudicial, but minimally relevant, evidence. I... have no difficulty concluding . . . that an entity’s retrospective self-assessment of its compliance with environmental regulations should be privileged in appropriate cases.<sup>40</sup>

The self-audit privilege was similarly applied in an environmental situation in the case of *Joiner v. Hercules, Inc.*<sup>41</sup> In that case, plaintiffs sought to compel production of a number of documents claimed by defendants to be privileged, including an in-house remediation study related to contaminated property.<sup>42</sup> The court recognized that the privilege had not been acknowledged by the state legislature, nor

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39. *Id.* at 525-26 (citing *Williams v. Vulcan-Hart Corp.*, 136 F.R.D. 457, 459 (W.D. Ky. 1991)); *Mao-Shiung Wei v. Bodner*, 127 F.R.D. 91, 100-01 (D.N.J. 1989); *Witten v. A. H. Smith & Co.*, 100 F.R.D. 446, 449-54 (D. Md. 1984); Note, *Criticizing the Self-Criticism Privilege*, 1987 U. ILL. L. REV. 675, 684-85 (1987); J. Flanagan, *Rejecting a General Privilege for Self-Critical Analyses*, 551 GEO. WASH. L. REV. 551, 582, (1983)).

40. *Id.* at 526 (quoting *Univ. of Pa. v. Equal Employment Opportunity Comm’n*, 493 U.S. 182, 189 (1990) (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980))).

41. 169 F.R.D. 695 (S.D. Ga. 1996).

42. *Id.* at 696.

did it enjoy widespread acceptance in the federal courts.<sup>43</sup> The court gave short shrift to the numerous policy concerns at issue, noting only that “the policy behind the privilege in this particular case is to encourage a private company to perform self-audits, in order to comply fully with environmental laws, without fear that those audits will be discoverable.”<sup>44</sup>

Applying its abbreviated policy analysis to the facts before it, the court ruled:

The documents and files for which Hercules claims that the [self-critical analysis] privilege applies were prepared or created by Hercules in order to evaluate the company's compliance with environmental laws and regulations. . . . Given that at least two other federal courts in Georgia have recognized the [self-critical analysis] privilege, and that it “promote[s] sufficiently important interests to outweigh the need for probative evidence . . .” in this case, the Court finds that the privilege protects those documents over which Hercules claims the privilege.<sup>45</sup>

The court in *Louisiana Environmental Action Network, Inc. (“LEAN”) v. Evans Industries, Inc.*<sup>46</sup> took an opposite view of the self-critical analysis privilege. In that case, plaintiff in a citizens’ suit under the Clean Water Act<sup>47</sup> sought production of the results of in-house testing conducted at defendants’ facility.<sup>48</sup> The court began by recognizing that no court in the Fifth Circuit had addressed whether such a privilege was the law for that circuit.<sup>49</sup> Nevertheless, the court noted that:

[E]ven if such a privilege exists in the Fifth Circuit, th[e] justifications for it do not support its application to volun-

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43. According to the court, “While the Georgia legislature has not yet clearly embraced the SCA privilege, several courts, however, have recognized it.” *Id.* at 698 (citations omitted).

44. *Id.* at 699 (footnote omitted).

45. *Id.* (second ellipsis in original) (quoting *Univ. of Pa. v. Equal Employment Opportunity Comm’n*, 493 U.S. 182, 189 (1990)).

46. No. 95-3002, 1996 U.S. Dist. LEXIS 8117 (June 10, 1996) [hereinafter *LEAN*].

47. See 33 U.S.C. § 1365.

48. *LEAN*, 1996 U.S. Dist. LEXIS 8117, at \*4.

49. *LEAN*, 1996 U.S. Dist. LEXIS 8117, at \*5.

tary environmental self-analyses. As correctly noted by the plaintiff,

the consequences of failure to comply with state and federal environmental laws and regulations—including the possibility of criminal sentences, substantial civil penalties, debarment from entering into government contracts and public disapproval—make it essential that corporations constantly evaluate their compliance with those laws and regulations.

Thus, there is no reason to believe that the possibility of disclosure during discovery would deter such evaluations.<sup>50</sup>

In declining to apply the privilege to defendant's self-audit, the court in *LEAN* also questioned whether the materials were prepared with the requisite expectation of confidentiality under *Dowling*.<sup>51</sup> As the court observed, "it is not clear that such environmental reviews are always performed with the expectation that they will be kept confidential. Indeed, the EPA has agreed to waive a portion of the penalties for violations that are promptly disclosed and corrected through voluntary compliance management systems."<sup>52</sup>

### III. STATUTORY AND REGULATORY ALTERNATIVES TO THE JUDICIALLY CREATED PRIVILEGE

The foregoing discussion highlights the decidedly strained, if not haphazard, development of a judicially created, or common-law, self-evaluative privilege, as well as the inconsistencies that result from its application. This section will address the various statutory and regulatory initiatives that have been proposed and/or implemented in an attempt to address the same concerns that led to the development of the judicially created privilege.

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50. *LEAN*, 1996 U.S. Dist. LEXIS 8117, at \*7 (citation omitted).

51. See *supra* note 14 and accompanying text.

52. *LEAN*, 1996 U.S. Dist. LEXIS 8117, at \*7 (citation omitted) (citing U.S. Env'tl. Prot. Agency, Incentives for Self-Policing: Disclosure, Correction, and Prevention of Violations, 60 Fed. Reg. 66,706 (Dec. 22, 1995) [hereinafter 1995 EPA Policy]).

A. *The Environmental Protection Agency Audit Policy*

On December 22, 1995, the Environmental Protection Agency (EPA) published *Incentives for Self-Policing: Disclosure, Correction, and Prevention of Violations*.<sup>53</sup> The stated goal of the policy is “to enhance protection of human health and the environment by encouraging regulated entities to discover voluntarily, disclose, correct and prevent violations of federal environmental law.”<sup>54</sup> Under the policy, if a violation of an EPA-administered statute or regulation has been voluntarily discovered,<sup>55</sup> promptly disclosed<sup>56</sup> and timely remediated,<sup>57</sup> the EPA will reduce gravity-based penalties by a factor of seventy-five percent.<sup>58</sup> Further, if the violation was discovered through an environmental audit or other “documented, systematic procedure or practice reflecting the regulated entity’s due diligence in preventing, detecting, and correcting violations,”<sup>59</sup> the EPA will not seek *any* gravity-based penalties as a result of the violation,<sup>60</sup> and

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53. 1995 EPA Policy, *supra* note 52. See also U.S. Env’tl. Prot. Agency, *Incentives for Self-Policing: Disclosure, Correction, and Prevention of Violations*, 65 Fed. Reg. 19,618 (Apr. 11, 2000) (re-stating the 1995 policy in substantial part) [hereinafter 2000 EPA Policy].

54. 1995 EPA Policy, *supra* note 52, at 66,706.

55. *Id.*, ¶ II.D.2, at 66,711. The violation must not have been identified through a legally mandated monitoring or sampling requirement such as a continuous emissions monitor required by permit. *Id.*

56. *Id.* ¶ II.D.3, .4. The violation must be disclosed within 10 days of discovery, and prior to the entity’s being investigated by a governmental agency or named as a defendant in a third-party complaint. *Id.*

57. *Id.* ¶ II.D.5. The violation must be corrected within 60 days; if more than 60 days are required, the party must so notify EPA in writing before expiration of the 60 days. *Id.*

58. *Id.* ¶ II.C.2.

59. *Id.* ¶ II.D.1(b).

60. *Id.* ¶ II.C.1. EPA’s penalty policies are set forth in published guidance documents. See, e.g., U.S. Env’tl. Prot. Agency, *Policy on Civil Penalties* (1984), 17 ENVTL. L. REP. 35,083 (1987).

will not recommend criminal enforcement as against the regulated entity, subject to certain additional conditions.<sup>61</sup>

The EPA's policy remains strongly opposed to the creation of a statutory evidentiary privilege. According to the EPA:

[T]he Agency remains firmly opposed to the establishment of a statutory evidentiary privilege for environmental audits for the following reasons:

1. Privilege, by definition, invites secrecy, instead of the openness needed to build public trust in industry's ability to self-police. . . .
2. Eighteen months have failed to produce any evidence that a privilege is needed. Public testimony on the interim policy confirmed that EPA rarely uses audit reports as evidence. . . .
3. A privilege would invite defendants to claim as "audit" material almost any evidence the government needed to establish a violation or determine who was responsible. . . .
4. An audit privilege would breed litigation, as both parties struggled to determine what material fell within its scope. The problem is compounded by the lack of any clear national standard for audits. . . .<sup>62</sup>

Moreover, according to the EPA, "[t]he Agency's policy eliminates the need for any privilege as against the government, by reducing penalties and criminal liability for those companies that audit, disclose, and correct violations."<sup>63</sup>

Contrary to judicial privilege, the EPA policy directly links the decision to conduct an environmental audit with a resultant decrease in the assessed penalty. The EPA policy eliminates some of the uncertainties and inconsistencies associated with application of a privilege against discovery in an attempt to achieve the same end by making this link.

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61. *Id.* ¶ II.D.3. As additional conditions, the violation must not involve a prevalent philosophy or practice of concealing or condoning environmental violations, or high-level managers' willful blindness to the violations. *Id.*

62. *Id.* ¶ I.F., at 66,710.

63. *Id.*

### B. *The Department of Justice Policy*

The Department of Justice (DOJ) has issued guidance similarly designed to mitigate enforcement decisions and penalties against entities that have conducted voluntary compliance audits. It is DOJ's stated policy to "encourage self-auditing, self-policing, and voluntary disclosure of environmental violations by the regulated community by indicating that these activities are viewed as mitigating factors in the Department's exercise of criminal enforcement discretion."<sup>64</sup> Among the factors that the DOJ will consider are the degree of voluntary disclosure, cooperation, preventive measures and compliance programs; pervasiveness of noncompliance; internal disciplinary action; and subsequent compliance efforts.<sup>65</sup>

In addition to this policy, DOJ has proposed that voluntary environmental self-audits be considered by the courts as mitigating factors in sentencing following successful prosecutions. A 1993 draft policy statement recommends that courts consider the following factors as possibly warranting sentence reductions: line management attention to compliance; integration of environmental policies, standards, and procedures; auditing, monitoring, reporting and tracking systems; regulatory expertise, training and evaluation; incentives for compliance; disciplinary procedures; and continuing evaluation and improvement.<sup>66</sup>

Thus, both the EPA and DOJ have clear policy preferences for rewarding regulated entities that conduct voluntary self-audits. Beyond this, a number of states have enacted legislation that codifies a privilege against disclosure of self-evaluative materials. These state laws are discussed below.

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64. U.S. Dep't of Justice, *Factors In Decisions On Criminal Prosecutions For Environmental Violations In The Context Of Significant Voluntary Compliance Or Disclosure Efforts By The Violator* (July 1, 1991), *quoted in* U.S. Env'tl. Protection Agency, *Restatement of Policies Related to Environmental Auditing*, 59 Fed. Reg. 38,455, 38,458 (July 28, 1994).

65. *See id.*

66. *See id.*

### C. State Initiatives

According to a 1999 survey, at least twenty-two states provide some degree of discovery protection for environmental audit results.<sup>67</sup> A number of those states also offer immunity from civil and/or criminal liability for an entity that has conducted such an audit.<sup>68</sup> Most of these states provide that the privilege is lost when as-

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67. Keith M. Casto & Tiffany Billingsley Potter, *Environmental Audits: Barriers, Opportunities and a Recommendation*, 5 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 261, 271 (1999). The states include Alaska, Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, Ohio, Oregon, South Carolina, South Dakota, Texas, Utah, Virginia and Wyoming. *Id.*

68. *Id.* app. A, at 252. The following table summarizes the availability of civil and/or criminal immunity for voluntary disclosure of environmental audit results:

State	Immunity or reduction in Penalties	Immunity fr. Criminal charges
AK	Yes	No
AR	No	No
CO	Yes	Yes
ID	Yes	Yes
IL	No	No
IN	No	No
KS	Yes	Yes
KY	No	No
MI	Yes	Yes
MN	Yes	Yes
MS	No	No
MT	Yes	No
NH	Yes	No
NJ	Yes	Yes
OH	Yes	No
OR	No	No
SC	Yes	No
SD	Yes	Yes
TX	Yes	Yes
UT	n/a	n/a
VA	Yes	No
WY	Yes	No



serted for fraudulent purposes, when the information is disclosed to third parties, or where there is non-compliance with environmental laws and a failure to correct them. A few states also provide an exception to the privilege where a prosecutor asserts a need for the information.<sup>69</sup> Nevertheless, as is the case with all privilege exceptions, those states that warrant the production of otherwise privileged self-audits place the burden on the party seeking discovery to state a compelling need for the information.

An interesting question arises, when a federal court exercises supplemental or diversity jurisdiction over claims arising in a state that has enacted a statutory self-audit privilege.<sup>70</sup> According to the Federal Rules of Evidence:

Except as otherwise required . . . the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law.<sup>71</sup>

A conflict may arise, however, in an action involving both state and federal claims. The court in *Reichhold*<sup>72</sup> addressed such a situation. In that case, plaintiff Reichhold Chemicals brought a contribution action under CERCLA to recover its response costs.<sup>73</sup> In addition to this federal claim, Reichhold's complaint also asserted a number of state-law claims pursuant to the court's supplemental jurisdiction. The law of Florida does not privilege self-audits,<sup>74</sup> while the *Reich-*

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*Id.*

69. *Id.*

70. See generally David Sorenson, *The U.S. Environmental Protection Agency's Environmental Auditing Policy and Potential Conflict with State-Created Environmental Audit Privilege Laws*, 9 TUL. ENVTL. L.J. 483 (1996).

71. FED. R. EVID. 501.

72. 157 F.R.D. 522 (N.D. Fla. 1994). See *supra* notes 33-37 and accompanying text.

73. *Reichhold*, 157 F.R.D. at 528.

74. *Id.* at 524.

*hold* court had recognized the federal common-law privilege developed in *Bredice* and its progeny.<sup>75</sup> According to the court:

The defendants assert that . . . even if the documents in question are privileged for the federal claims, they are discoverable for the state claims. If the defendants' interpretation of Rule 501 is correct, in a case such as this one, in which pendent state law claims are intermixed with federal claims based on the same underlying facts, two separate laws of privilege would apply simultaneously. . . .

The five circuit courts of appeals, which have considered this issue, along with a plethora of trial courts, have uniformly held that in a federal question case with pendent state law claims, the federal law of privileges governs the entire case.<sup>76</sup>

The court thus concluded that the *federal* policy favoring the self-audit privilege superceded any policy of the state of Florida, which had not incorporated a statutory self-audit privilege into its laws.<sup>77</sup>

The more difficult situation is that of a federal court inclined to conclude that there is *no* federal common-law privilege, facing simultaneous state and federal claims in a state that *has* adopted a statutory self-audit privilege. Such a court might feel pressured to

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75. *Id.* at 524-27.

76. *Id.* at 528 (citations omitted) (citing *Hancock v. Hobbs*, 967 F.2d 462, 466 (11th Cir. 1992); *Hancock v. Dodson*, 958 F.2d 1367, 1373 (6th Cir. 1992); *Von Bulow v. Von Bulow*, 811 F.2d 136, 141 (2d Cir. 1987); *William T. Thompson Co. v. Gen. Nutrition Corp.*, 671 F.2d 100, 104 (3rd Cir. 1982); *Mem'l Hosp. for McHenry County v. Shadur*, 664 F.2d 1058, 1061 n.3 (7th Cir. 1981)).

77. *Cf. id.* According to the court:

[E]ven if the defendants were correct, it is far from certain that Florida law would require the production of such documents. As all parties correctly note, Florida courts are forbidden from adopting new privileges by judicial decision. However, Florida courts have consistently held that the *Bredice* decision which created the self-critical analysis privilege has been adopted in the common law of Florida, not as a rule of privilege, but as a discretionary right of a court on grounds of public policy.

*Id.* (citations omitted).

give way to the statutory privilege that would otherwise apply to the state-law claims. The virtual certainty that such situations will arise does not portend positive outcomes for those who would argue for regional consistency, at least, in the application of the self-audit privilege.

The discussion that follows turns to a more detailed analysis of the various policy arguments for and against a privilege against disclosure of self-audits.

#### IV. ANALYSIS OF POLICIES AFFECTING THE DECISION WHETHER TO GRANT A SELF-AUDIT PRIVILEGE

##### *A. The Economic Interest of the Regulated Entity*

It is frequently claimed that an evidentiary privilege protecting self-audits helps to offset the “illicit” economic benefit that can accrue to companies who decide not to spend the money to conduct such audits, and to play the odds that their environmental non-compliance will not be detected. Consider the following hypothetical:

Company A adopts a policy favoring environmental responsibility at the highest level of management. To assure compliance with applicable environmental law to the best of its ability . . . , Company A establishes a comprehensive program of internal auditing and reporting. . . . The availability of this evidence increases Company A’s exposure to legal liability.

Company B pursues an implicit policy of ignoring the environmental effects of its operations, unless it appears that a governmental agency would be likely to discover a serious violation of law . . . . When the government or third-party plaintiffs sue Company B, discovery yields minimal evidence of violations . . .

Other factors being equal, Company B has an economic advantage over Company A in the market. An evidentiary privilege to protect the internal communications of Company A’s environmental audits would help to level

the playing field between Company A and Company B.<sup>78</sup>

As the hypothetical demonstrates, the self-auditing company suffers an economic disadvantage, both from having spent the money to perform the audit and because it now has greater exposure to liability for having so done. An evidentiary privilege protecting self-audits from disclosure would help neutralize that disadvantage. The argument is in fact even stronger than the hypothetical indicates. The hypothetical overlooks an important benefit that a company can expect from performing a self-audit: any incremental increase in the company's risk of liability may be offset by a *decrease in the severity* of any resulting penalty, as may occur through either the enforcement agency's exercise of discretion, or through the fact finder's decision to reward the entity's commendable behavior by assessing lower penalties. Thus, the increased exposure may be less consequential than the hypothetical suggests.

The extent to which a self-audit might itself prompt enforcement is determined by a number of factors. These factors include the probability that an audit will reveal contamination at levels triggering enforcement, whether the entity conducting the audit is required to actually report the results to an enforcement agency,<sup>79</sup> whether that agency has discretion to forgo enforcement to reward the company's commendable conduct, and the degree of discoverability of the information (if reporting is not mandatory). It is only the last of these factors that an evidentiary privilege for self-audits would affect.

An enforcement agency may have discretion to reduce punitive awards against an entity that has performed commendably, but may lack the discretion to waive the requirement to perform a complete and effective cleanup.<sup>80</sup> Thus, the cost of restoring the property to

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78. Eric W. Orts & Paula C. Murray, *Environmental Disclosure & Evidentiary Privilege*, 1997 U. ILL. L. REV. 1 (1997).

79. See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603 (2000) (requiring an operator of a facility to notify the National Response Center once it has knowledge that a release of hazardous substances has occurred in excess of tabulated quantities).

80. This is the variable that various "Brownfields" proposals attempt to address. See generally Joel B. Eisen, "*Brownfields of Dreams*"?: *Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 4 U. ILL. L. REV. 883 (1996).

within statutorily acceptable levels of contamination can be seen as a "baseline penalty."<sup>81</sup>

Although it may be argued that this "baseline penalty" is one that an operator would have to pay in any event, this may not be always the case. The contamination may dissipate (or become worse); regulatory standards may change; or a company may discount the economic equation through reliance on future managers, future property owners, science, or the bankruptcy courts. These factors are impossible to precisely quantify at the time a company is faced with the decision whether to conduct an environmental audit, but do nevertheless affect the "baseline penalty."

The salient point is that the privilege against disclosure of self-audit materials is meant to affect the polluting entity's decision whether to conduct a voluntary audit by reducing the *likelihood* that the entity will be found liable in a subsequent enforcement action. In contrast, a policy that rewards self-auditing companies by *reducing the damages* available against them more directly addresses the concerns of those companies. If conducting a self-audit might enable a company to reduce its damages, the question for the company becomes whether that reduction offsets the increased risk that an enforcement action will ensue from the audit, as well as the cost of the audit itself.

In jurisdictions where inspection programs are vigorous, a company already faces significant risk of enforcement, so the increased risk of enforcement resulting from a self-audit may be small.<sup>82</sup> Where investigation and enforcement are historically lax, however, an operator may believe that liability can be kept below the baseline defined by the cost of cleanup, by hiding known or suspected contamination from enforcers, forcing them to engage in a "shell game" to find the contamination and identify its source. Thus, where enforcement is lax, the availability of a disclosure privilege is not likely to encourage companies to conduct self-audits.

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81. See, e.g., 42 U.S.C. § 9603. This baseline may of course be reduced by any amount that can be attributed to the actions of a third party, which amount may not be known at the time the original decision whether to conduct an audit is made.

82. Naturally, the risk that an audit will prompt enforcement is strongest where companies are required to report their audit results, whether the regulating agencies are vigorous in their own investigation and enforcement or otherwise.

The possibility of liability for punitive damages in a third-party civil suit, such as might be brought by neighboring property owners, subsequent owners of the same contaminated property, and/or citizens' groups, is probably the "bottom-line" factor that looms largest for most companies in deciding whether to conduct environmental self-audits. Such damages can be enormous in jurisdictions where the awards are not limited. The fear of punitive damages may prompt businesses and business organizations to advocate for legislation enacting a self-audit privilege. However, that fear is perhaps just as likely to discourage companies from performing self-audits in the first place. This suggests that the economic interest of the regulated entity alone cannot provide a sufficient rationale for an environmental self-audit privilege. The sections that follow discuss additional policy interests that may provide more.

### *B. The Public's Economic Interest*

As stated above, the risk of a governmental enforcement action and the likely severity of any resultant penalty are factors influencing a regulated entity's decision whether to conduct an environmental self-audit. However, it must be remembered that the government also has an economic interest to consider, that of controlling its enforcement costs. The challenge for the government in a penalty-based system then becomes determining the precise amount of incentives in the form of reduced penalties that will decrease the public's investigation and enforcement costs, without compromising deterrence. As one author has noted, if in order to encourage environmental self-audits the government gives polluters incentives amounting to immunity from liability or damages, "given the dwindling government resources devoted to environmental enforcement, engaging in a cycle of violation and compliance audits rather than investing in prevention appears to make good economic sense [for the polluters]." <sup>83</sup>

However, in any environmental prosecution, even if the regulated entity is granted a privilege against disclosure of its self-audit materials, the government must still prove liability, and will likely have to independently prove the facts that were established by the audit.

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83. David N. Cassuto, *Nastygram Federalism: A Look at Federal Environmental Self-Audit Policy*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 261, 273 (1999).

Thus, the self-audit privilege will increase the government's enforcement expenses—expenses that the privilege should *reduce*.

Nevertheless, the regulated entity is likely to be more efficient than the government in conducting investigations of its own facilities. The entity is more likely to be aware of the contamination in the first instance, whereas without an expensive inspection and monitoring program in place, a regulating agency will be forced to rely on the reports of affected individuals that may arrive long after the greatest damage has occurred. Moreover, as will be shown, the regulated entity's greater knowledge of its own facilities affects not only the public's interest in conserving investigatory resources, but its interest in promoting scientific certainty in an important area of public health and safety.

### *C. The Public's Interest in Effective Cleanup and Scientific Certainty*

The evaluation of a contaminated property involves the taking of various soil samples and extrapolating data from those sample points in an effort to determine contamination volumes, levels, constituents, and area extent. Increasing the number of sample points can enhance the scientific certainty of the evaluation. Sampling is of a higher effectiveness when more is known regarding the nature of the contaminant release, the processes that caused the contamination, and the identity of the contaminants.<sup>84</sup> The public has an interest in acquiring as much of this information as possible at the outset of the evaluation process.

If a defendant is allowed to withhold sample results and other studies then the opposing party, be it a private plaintiff or the government, will likely have to independently acquire that data, at great expense. If, on the other hand, each party were required to produce all its data in discovery, each party's experts would likely benefit from the other's data. Scientific certainty would thereby be enhanced and resources would be conserved. Individuals affected by the release might also be able to receive treatment that much sooner. Such a compelling health-and-safety interest is arguably unquantifiable in simple economic terms.

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84. See generally Multi-Agency Radiation Survey and Site Investigation Manual ("MARSSIM"), at <http://www.epa.gov/radiation/marssim/obtain.htm> (last viewed Apr. 1, 2004).

### D. Transparency

For some time now there has been a general public desire for greater transparency in the workings of government, and this desire has been embodied in a number of legislative and procedural enactments. For example, the Freedom of Information Act was designed to open administrative processes to public scrutiny.<sup>85</sup> Similarly, the discovery provisions of the Federal Rules of Civil Procedure were recently amended to provide greater access to facts that form the basis of litigation.<sup>86</sup> The issue has also become increasingly important among environmental scholars and advocates, and their efforts have led to several initiatives designed to promote transparency in that field.<sup>87</sup> Recently enacted Brownfields legislation creates incentives for prospective purchasers of contaminated properties to con-

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85. See 2 STEIN ET AL., ADMINISTRATIVE LAW § 7.05[1], at 7-32 to 7-41 (2001). "The primary purpose of the Act, as indicated from its legislative history, and confirmed by the courts, is to open administrative processes to the scrutiny of the press and the general public." *Id.*

86. See, e.g., FED. R. CIV. P. 26(a)(2)(B). This provision, added in 1993, requires a party to produce an expert report prepared by an expert retained by a party who is expected to provide expert testimony at trial. According to the Advisory Committee Notes accompanying the rule:

The report is to disclose the data and other information considered by the expert and any exhibits or charts and summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

*Id.* Advisory Committee's Note.

87. E.g., Patricia Isela Hansen, *Transparency, Standards of Review, and the Use of Trade Measures to Protect the Global Environment*, 39 VA. J. INT'L L. 1017 (1999); Mark J. Spaulding, *Transparency of Environmental Regulation and Public Participation in the Resolution of International Environmental Disputes*, 35 SANTA CLARA L. REV. 1127 (1995).



duct site investigations and remediations, subject to public oversight and approval.<sup>88</sup> These and other initiatives can be expected to provide the framework for greater, rather than lesser, transparency in the realm of environmental enforcement. The very idea of an evidentiary privilege protecting the results of self-audits, since it allows industry actors to withhold environmental information from regulators and private plaintiffs, seems to run counter to this trend towards transparency. An equally strong public interest is needed to justify the privilege because public health and safety are at issue. As the Supreme Court has stated with regard to privileges in another context, "these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."<sup>89</sup>

Proponents of the self-audit privilege may argue, however, that this privilege, like any other, allows a defendant to withhold important information precisely in furtherance of a *more* compelling public policy. The ordinary criminal defendant often has information the prosecutor would prefer to have, but public policy affords defendants a privilege against self-incrimination. Similarly, a doctor may have information that, if disclosed, might protect third parties from infection; however, in some instances, privileges protect that information from disclosure. Many find the argument for an environmental self-audit privilege equally compelling. The question is not whether the self-audit privilege is justified by comparison to other privileges, but whether a *new* privilege ought to be created when there may be other ways to encourage effective industry self-regulation.

### E. *Corporate Good Will*

No discussion of the factors affecting a company's decision whether to conduct a voluntary environmental self-audit would be complete without mention of the desire to promote and protect the corporate reputation.<sup>90</sup> A company's public image is closely related with its economic interests. As observed by one court, in a case addressing the self-audit privilege in the context of cruise ship safety audits:

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88. See generally Eisen, *supra* note 81.

89. United States v. Nixon, 418 U.S. 683, 710 (1974).

90. See generally Andrea A. Curcio, *Painful Publicity—An Alternative Punitive Damage Sanction*, 45 DEPAUL L. REV. 341 (1996).

[O]rganizations . . . have a strong incentive to avoid developing a reputation for having unsafe premises. Such a reputation would make it more difficult for a corporation to attract desirable employees, and in the case of a cruise ship . . . to attract customers. One need only view a few automobile advertisements to recognize that manufacturers perform safety tests not required by law not only because of the threat of products liability suits for design defects, but because a reputation for safety renders a product more marketable.<sup>91</sup>

Public-image concerns are especially important in the environmental arena, in which non-governmental organizations are becoming increasingly sophisticated at acquiring the necessary data to support charges of “greenwashing.”<sup>92</sup> A company that promotes its “green” environmental record while simultaneously refusing to disclose to the public evidence of harmful contamination might be accused of “greenwashing” its environmental record. Such charges will detract from expensive public-relations efforts, making those efforts seem fraudulent, at least to some.

#### V. APPLICATION OF COURT-REFORM PRINCIPLES TO THE CASE AGAINST A COMMON-LAW SELF-AUDIT PRIVILEGE

Thus far, we have seen that important public-policy goals may be furthered by granting a polluting entity some kind of benefit in exchange for its decision to conduct a voluntary self-audit. Nevertheless, it seems clear that legislative enactments directed at reducing

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91. *Dowling v. Am. Haw. Cruises, Inc.*, 971 F.2d 423, 426 (9th Cir. 1992) (citing *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757 (Cal. App. 1981)); see e.g. David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 16-19 (1982).

92. “‘Greenwashing’ is a term applied by some in the environmental community to business efforts to promote publicly their environmental achievements.” David B. Spence, *Can The Second Generation Learn From The First? Understanding The Politics of Regulatory Reform*, 29 CAP. U. L. REV. 205, 216 n.61 (2001) (citation omitted). This definition surely understates the cynicism of the word-play, which suggests an element of misrepresentation.

the *penalties* available in an enforcement action, rather than the *discoverability* of the audit results themselves, are more likely to achieve the desired objectives. Such enactments can grant the entity a more certain benefit while preserving the discoverability of scientific data. An analysis similar to that commonly applied to court-reform proposals will make this clear.

*A. Normative Considerations Militate Against the Creation of a Judicial Privilege Protecting Environmental Audits*

Consideration of normative concerns, in the context of the perceived need to grant an incentive to those who would conduct voluntary environmental self-audits, reveals that a judicially created privilege falls far short of providing the predictability that is necessary to provide an adequate incentive.

A discussion of normative and prudential considerations in an environmental context necessarily begins with two postulates. First, the region-to-region disparities that are seen in the application of any common-law privilege often provoke a "race to the bottom."<sup>93</sup> In this scenario, states and regions are given wide latitude in choosing environmental standards. They may then compete for increasingly low standards in order to attract development. Such a race to the bottom could be disastrous in the environmental context. Consistent federal standards, in contrast, would level the playing field and prevent environmental standards from becoming an economic bargaining chip.<sup>94</sup> The paradigm that has developed in the realm of pollution-control strategies is one in which there are minimum federal standards, subject to the right of the states to set more stringent standards.<sup>95</sup>

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93. *But cf.* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

94. *See* RICHARD L. REVESZ, FOUNDATIONS IN ENVIRONMENTAL LAW AND POLICY 191, 191 (1997).

95. *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9614 (2000). "Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." *Id.*

Second, since clear Supreme Court guidance on the issue of a common-law self-audit privilege is unlikely to be forthcoming, it is improbable for such a privilege to have a nation-wide normative effect on the incentive to conduct environmental self-audits. Even if such a privilege were to develop within some federal circuits, in the absence of sound regulatory guidance it is unlikely to be applied by the district courts consistently enough to create the desired incentive.

Given these two postulates, it seems that a common-law privilege is particularly unsuited to achieve the desired incentives. An inconsistently-applied federal privilege can hardly be expected to achieve a consistent federal threshold of accountability. Moreover, it does not address the “baseline” of liability that is represented by the cost of cleanup.<sup>96</sup> Where application of a privilege results in a degree of liability that falls short of this baseline, the remaining cleanup costs will likely be borne by taxpayers or other innocent third parties.

Any normative effect that a common-law privilege might have would be further diminished because it would conflict with many existing state initiatives in cases with both state and federal claims, raising questions of supremacy and comity.<sup>97</sup> Should a federal self-audit privilege trump state policy requiring penalty reductions? Normative considerations demand that this question be answered in the negative.

An argument could also be made that, in mixed state-federal cases, a normative federal policy against a self-audit privilege should not trump a state policy recognizing such a privilege. Yet in a state-federal paradigm that envisions minimum federal standards overlain by more stringent state standards in particular cases, such state policy should give way to more manageable penalty-based incentives.

#### *B. Prudential Considerations Favor Penalty-Based Incentives Providing Transparent Regulatory Monitoring and Oversight*

In addition to normative concerns, there are prudential reasons that penalty reductions should be favored over evidentiary privileges as incentives to promote self-auditing. Foremost among these reasons is the negative effect the privilege would likely have on public confidence in the agencies entrusted with environmental protection. Those agencies will surely be seen as ineffectual if the entities they

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96. See discussion *supra* part III.A.

97. See discussion *supra* part II.C.

regulate are allowed to withhold important scientific data. Moreover, shifting the responsibility for cleanup oversight to the very actors that created the problem raises public fears of the “fox guarding the henhouse.” As the EPA itself has pointed out, “[p]rivilege, by definition, invites secrecy, instead of the openness needed to build public trust in industry’s ability to self-police.”<sup>98</sup> Just as it is imprudent to take away a court’s ability to exercise control over matters within the courtroom, it is equally unwise to diminish the power of an environmental oversight agency by thwarting its ability to exercise control over the intricate details of an environmental cleanup.

Second, penalty-based incentives make better use of regulatory programs to monitor effectiveness and learn from experimentation in other jurisdictions. Whereas evidence suggesting that an evidentiary privilege promotes self-auditing is largely anecdotal, the EPA has taken great pains to provide justification for its program, tailor its provisions to industry needs, and monitor its efficacy. For example, according to the EPA’s 1995 policy announcement, “more than 90% of the corporate respondents to a 1995 Price-Waterhouse survey who conduct audits said that one of the reasons they did so was to find and correct violations before they were found by government inspectors.”<sup>99</sup> According to the agency, “[m]ore than half of the respondents to the same . . . survey said that they would expand environmental auditing in exchange for reduced penalties for violations discovered and corrected.”<sup>100</sup> Relying on the same survey, the EPA found that “those few large or mid-sized companies that do not audit generally do not perceive any need to; concern about confidentiality ranked as one of the least important factors in their decisions.”<sup>101</sup> Based on the results of that survey, the agency concluded, “companies would expand their auditing programs in exchange for the kind of incentives that the EPA provides in its policy.”<sup>102</sup>

The EPA conducted a follow-up review of its policy three years after its inception, in order to evaluate its effectiveness. The review, surveyed both internal staff and regulated entities, and solicited public comment through notices in the Federal Register and other me-

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98. 1995 EPA Policy, *supra* note 52, at 66,710.

99. *Id.* at 66,707.

100. *Id.*

101. *Id.* at 66,710.

102. *Id.*

dia.<sup>103</sup> Following this review, the EPA republished the policy with refinements. Clearly, the EPA's acquisition and analysis of data in order to refine agency policy is more valuable than a court-created common-law privilege that withholds valuable information from the agency that is supposed to be guiding the policy in the first instance.

Finally, the argument enunciated by the Supreme Court in *University of Pennsylvania* must be addressed. The Court rejected the notion of an evidentiary privilege for the peer-review materials at issue in that case, expressing concern that granting the privilege would open the floodgates to similar claims of privilege, claims which could only be resolved through even more litigation.<sup>104</sup> The EPA also voiced this concern in its 1995 policy guidance, stating that "[a]n audit privilege would breed litigation, as both parties struggled to determine what material fell within its scope."<sup>105</sup> These prudential concerns weigh heavily against the creation of a common-law self-audit privilege, and argue in favor of an agency-monitored, penalty-based incentive.

## VI. CONCLUSION AND RECOMMENDATIONS

From a public-policy viewpoint, the kind of policy analysis that courts typically undertake in determining whether to protect self-audit materials from disclosure is insufficient to determine whether such a privilege is warranted. Since various courts hearing environmental suits will balance the interests of the parties before them in different ways, often using one-sided, anecdotal evidence in their decisions, an evidentiary privilege will almost necessarily be applied inconsistently.

However, a traditional court-reform analysis shows the advantages of using penalty reductions as incentives to promote self-audits. Federal environmental enforcement authorities have considered whether an evidentiary privilege would serve to encourage such self-audits, and those authorities have stated a clear policy against such a privilege. According to those agencies, the assurance of reduced sanctions for those companies that do audit is adequate incentive.

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103. 2000 EPA Policy, *supra* note 53, at 19,619.

104. *Univ. of Pa. v. Equal Employment Opportunity Comm'n*, 493 U.S. 182 (1990); *see supra* notes 16-30 and accompanying text.

105. 1995 EPA Policy, *supra* note 52, at 66,710.

While a privilege can be seen as promoting secrecy and scientific uncertainty, a penalty-based policy promotes openness and conserves economic resources. In addition, normative and prudential considerations support penalty-based incentives that can be monitored and tailored by the regulating agencies, rather than a discovery-based privilege characterized by inconsistent application, illusory relief from liability and the unlikelihood of reductions in damages. While no policy-based self-audit incentive will be effective without vigorous inspection, monitoring, and enforcement, an incentive can be designed in such a way that it does not compromise deterrence and cleanup effectiveness.

It is thus this article's recommendation that courts refrain from recognizing a privilege against discovery of environmental self-audits. It is properly the task of regulators and legislators to design incentives to promote the practice of environmental self-audits, and then to promulgate them in written policies and legislative enactments. Those regulators and legislators should be encouraged to adopt penalty-based incentives that are specifically tailored to address the regulated entities' true concerns, rather than privileges that postpone cleanup measures, waste economic resources, and encourage the evasion of the search for truth.